IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NADINE HOSHAUER, Plaintiff,	:	
v.	:	No. 12-cv-1159-JKG (The Honorable James K. Gardner)
READING AREA COMMUNITY COLLEGE, Defendant.	:	

DEFENDANT'S BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

AND NOW, comes Defendant, Reading Area Community College (hereinafter referred to as "Community College"), by and through its attorneys, Sweet, Stevens, Katz & Williams LLP, to present the following Brief in support of its Motion to Dismiss Plaintiff's Complaint and avers as follows:

I. INTRODUCTION

Plaintiff initiated this action by way of Complaint on or around June 25, 2012. (Docket No. 1). Plaintiff seeks to recover pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621, *et. seq*., the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, and Pennsylvania common law. The Community College respectfully submits that Plaintiff's Complaint should be dismissed because it fails to contain the necessary factual averments to state a claim for which relief can be granted. Accordingly, by way of this instant Motion, pursuant to Fed.R.Civ.P. 12(b)(6), the Community College seeks to have this Court dismiss all of Plaintiff's claims.

II. FACTUAL AVERMENTS FROM COMPLAINT

Plaintiff, age 62, was employed by the Community College as a part-time writing instructor. (Docket No. 1, ¶¶ 6-8). On December 16, 2010, the Plaintiff was fired for not having adequate computer skills and replaced by someone younger. (Docket No. 1, ¶¶ 9-10, 12). Other older workers were also allegedly fired at the same time. (Docket No. 1, ¶ 11). The Plaintiff was earning $9 an hour and working 15 hours per week when she was terminated. (Docket No. 1, ¶ 13).

III. STANDARD OF REVIEW

The motion to dismiss standard under Rule 12(b)(6) was examined in the Supreme Court case of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Pursuant to *Iqbal*, it is clear that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice in defeating a Rule 12(b)(6) motion to dismiss." *Id*. at 1949; *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007). Applying the principles of *Iqbal*, the Third Circuit in *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d Cir. 2009) articulated a two part analysis that district courts in this Circuit must conduct in evaluating whether allegations in a complaint survive a 12(b)(6) motion to dismiss. *See also, Edwards v. A.H. Cornell & Sons, Inc.*, 610 F.3d 217, 219-20 (3d Cir. 2010).

First, the factual and legal elements of a claim should be separated, meaning "a District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Fowler*, 578 F.3d at 210-211. Second, the District Court must determine whether the facts alleged in the complaint demonstrate that the plaintiff has a "plausible claim for relief." *Id*. at 211. In other words, a complaint must do more that allege a plaintiff's entitlement to relief, it must "show" such an entitlement with the facts. *Id*. (*citing Phillips v. County of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008)). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it not 'shown' – that the pleader is entitled to relief." *Iqbal*, 129 S.Ct. at 1950. This plausibility determination under step two of the analysis is a "content specific task that requires the reviewing court to draw on it judicial experience and common sense." *Id.* This heightened standard of pleading applies to all civil suits in federal courts. *Fowler*, 578 F.3d at 210.

IV. ARGUMENT

A. Counts I and II of Plaintiff's Complaint Should Be Dismissed Because The Factual Averments Contained In The Complaint Fail To State A Claim For Which Relief Can Be Granted

Plaintiff asserts age discrimination claims in Counts I and II of the Complaint pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621, *et seq.* and the Pennsylvania Human Relations Act ("PHRA"), respectively.[1]

To plead a claim of discriminatory discharge under the ADEA, a plaintiff must allege that: (1) she was over 40 years of age; (2) the defendant took an adverse employment action against her; (3) she was qualified for the position which she held; and (4) she was replaced by a person sufficiently younger to support an inference of discriminatory animus. *Smith v. City of Allentown*, 589 F.3d 684, 689 (3d Cir. 2009). The United States Supreme Court has stated that to establish a claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Financial Services., Inc.*, 557 U.S. 167 (2009). Under the ADEA, a plaintiff cannot establish discrimination by showing that age was simply a motivating factor. *Id.*

"A mere allegation that an adverse employment action was motivated by age, without more, is the type of broad conclusory allegation that the Supreme Court found insufficient." *Pekar v. U.S. Steel/Edgar Thomson Works*, 2010 WL 419421, *7 (W.D. Pa. 2010); *Pezzoli v. Allegheny Ludlum Corporation*, 2010 WL 2852988, *1 (W.D. Pa. 2010). "The plaintiff must provide sufficient, non-speculative and non-conclusory allegations that, accepted as true, state a claim for age discrimination under the ADEA." *Id*.

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[1] As a matter of law, courts analyze claims brought under the PHRA in accordance with their federal counterparts. *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996) (finding that the "district court properly treated [plaintiff's] PHRA claims as coextensive with his ADEA claims").

In this case, the Complaint is void of the necessary factual allegations to support a claim of discrimination under the ADEA. Rather, the Complaint merely contains broad legal conclusions. For example, although the Complaint indicates that the Plaintiff is over 40 years of age and that the Community College took an adverse action against her (termination), the Complaint contains no factual allegations that she was qualified for the position which she held, that she was replaced by a person sufficiently younger, or that an inference of discriminatory animus is present. Instead, the Complaint merely avers non-sufficient, speculative and conclusory allegations such as the "Plaintiff was fired because of her age," was replaced by "younger worker(s)," and that the stated reason for Plaintiff's termination was "just a pretext to fire Plaintiff." (Docket No. 1, ¶¶ 9-12).

In short, the Complaint fails to meet the necessary pleading requirements as required by the United States Supreme Court and the Third Circuit to adequately state a valid claim under the ADEA. Accordingly, Counts I and II should be dismissed.

B. Count III of Plaintiff's Complaint Should Be Dismissed Because The Factual Averments Contained In the Complaint Do Not State A Claim For Relief Under The Common Law Doctrine Of Intentional Infliction Of Emotional Distress

Plaintiff asserts a Pennsylvania common law claim of Intentional Infliction of Emotion Distress in Count III of the Complaint.[2]

To state a claim for intentional infliction of emotional distress plaintiff must allege and show that defendants' conduct was (1) extreme and outrageous; (2) intentional or reckless, and

[2] The Community College respectfully submits that if this Court dismisses Plaintiff's ADEA claim, this Court should decline to exercise jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(3).

(3) caused severe emotional distress. *Livingston v. Borough of Edgewood*, 2008 WL 5101478 at *6 (W.D. Pa. 2008).

Pennsylvania has adopted the language contained in the *Restatement of Torts* (Second) § 46. *Field v. Philadelphia Electric Company*, 565 A.2d 1170 (Pa.Super. 1989); *Hoy v. Angelone*, 691 A.2d 476 (Pa.Super. 1997). The *Restatement of Torts* (Second) § 46 (comment d) states the following with regard to what constitutes extreme and outrageous conduct:

> *Extreme and outrageous conduct*. The cases thus far decided have found liability only where the defendants conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and which would be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse the resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express and unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

The *Restatement* also indicates that it is the court's duty, in the first instance, to determine if the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery. *Restatement of Torts* (Second) § 46 (comment h); *Dawson v. Zayre Dep't Stores*, 499 A.2d 648 (Pa.Super. 1985) (It is for the Court to determine, in the first instance, whether the actor's conduct can reasonably be regarded as so extreme and outrageous as to permit recovery).

Courts "have been cautious in permitting recovery for intentional infliction of emotional distress." *Williams v. Guzzardi*, 875 F.2d (3d Cir. 1989). The complained of conduct must be both extreme and very offensive to the moral values of society and recovery has been allowed only in limited circumstances where the conduct has been clearly outrageous. *Silver v. Mendel*, 894 F.2d 598, 606 (3d Cir. 1990); *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1979). See, *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (recovery allowed when team doctor told reporter that member of team suffered from fatal blood disorder though knowing it to be untrue); *Papieves v. Lawrence*, 263 A.2d 118 (Pa. 1970) (recovery allowed against hit and run driver who, without attempting to obtain medical assistance and without notifying police or parents, removed child's body from scene of accident and buried it in a field); *Hoffman v. Memorial Osteopathic Hospital*, 492 A.2d 1382 (Pa.Super. 1985) (denial of medical treatment in emergency room); *Commonwealth v. Balisteri*, 478 A.2d 5 (Pa.Super. 1984) (having sexual contact with two young children and encouraging sexual contact between them).

On the other hand, courts consistently dismiss claims for intentional infliction of emotional distress because the alleged conduct does not rise to extreme and outrageous conduct. See, *Kutner v. Eastern Airlines, Inc.*, 514 F.Supp. 553 (E.D.Pa. 1981) (no cause of action against airline for rerouting flight due to weather conditions); *Daughen v. Fox*, 539 A.2d 858 (Pa.Super. 1988) (no cause of action against veterinarian for confusing x-rays causing death of dog); *Dawson v. Zayre Dept. Stores*, 499 A.2d 648 (Pa.Super. 357 1985) (no cause of action against store employee for using a racial epithet in an argument with customer); *Gordon v. Lancaster Osteopathic Hospital Association, Inc.*, 489 A.2d 1364 (Pa.Super. 1985) (no cause of action against colleagues for publishing letters of "no confidence"); *Snyder v. Specialty Glass Products, Inc.*, 658 A.2d 366 (Pa.Super. 1995) (no liability when employee suffered verbal abuse and demotion to entry-level position when he came in late after providing emergency medical treatment on the way to work.)

Moreover, "it is extremely rare to find conduct in the employment context that will give rise to the level of outrageousness necessary to provide a basis for recovery of the tort of intentional infliction of emotional distress." *Cox*, 861 F.2d at 395; *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 940 (3d Cir. 1997). "Indeed, the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee." *Cox*, 861 F.2d at 395.

Here, as before, Plaintiff's Complaint is void of any factual averments to show that the alleged actions of the Community College were "extreme or outrageous" or "intentional or reckless." Rather, the Plaintiff is attempting to transform an employment discharge into something in which courts have refused to consider it as – a valid claim of intentional infliction of emotional distress. Accordingly, given the factual averments in the Complaint, Plaintiff's claim pursuant to the common law tort of intentional infliction of emotional distress is not appropriate and should be dismissed.

VI. CONCLUSION

For all the reasons stated above, the Community College's proposed Order should be entered and Plaintiff's Complaint should be dismissed.

SWEET, STEVENS, KATZ & WILLIAMS LLP

Date: August 2, 2012 By: /s/ Jonathan P. Riba

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CERTIFICATE OF SERVICE

I, Jonathan P. Riba, Esquire, counsel for the Defendant, Reading Area Community College, hereby certify that a true and correct copy of the foregoing Motion to Dismiss Plaintiff's Complaint and Brief in support were mailed to the following counsel at the following address, *via* regular U.S. Mail, on this date:

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Date: August 2, 2012 By: /s/ Jonathan P. Riba

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